

Federal Court



Cour fédérale

Date: 20100826

Docket: IMM-6233-09

Citation: 2010 FC 842

Montréal, Quebec, August 26, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**GABRIELA DE LAS FLORES CAMPOS
MONICA FLORES CAMPOS
NORA ESTELA FLORES CAMPOS
ESTHER CAMPOS JUANILLO
RODOLFO FLORES CAMPOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Immigration and Refugee Board, Refugee Protection Division (the panel) dated November 16, 2009, determining that the applicant and her four adult children were not Convention refugees or “persons in need of protection” within the meaning of sections 96 and 97 of the Act, and thus rejecting their claims for refugee protection.

Factual Background

[2] The applicant, Esther Campos Juanillo, and her four adult children, Gabriela De Las Flores Campos, Monica Flores Campos, Nora Estela Flores Campos and Rodolfo Flores Campos, are citizens of Mexico.

[3] Ms. Campos Juanillo alleged that she was a victim of physical assaults and death threats made by her former husband, Rodolfo Flores Gutierrez. She stated that she had stayed with him for the past 30 years out of fear because he had told her not to do anything or he would kill her.

[4] On July 1, 2006, following an incident in which Ms. Campos Juanillo was violently beaten by Mr. Flores Gutierrez, who also tried to strangle her, her four children advised her to leave or he would ultimately kill her. At about midnight, Ms. Campos Juanillo and her four children left their home in Tutitlan and went into hiding in a rented house in the San Bartolo neighbourhood of the municipality of Toluca in Mexico State.

[5] Ms. Campos Juanillo stated that on the same day, following that incident, she and her daughter filed a complaint with the Tutitlan police.

[6] Ms. Campos Juanillo stated that nothing was done by the authorities, and because her husband was still at large, she was afraid for her safety and the safety of her children.

[7] One week later, two of her daughters travelled to Tijuana in California State. On August 5, 2006, Ms. Campos Juanillo started working for a company in Toluca.

[8] In about mid-August 2007, Gabriela left for Canada to protect herself from her father, because she had allegedly received death threats from him. On October 27, 2007, her sister Monica also left for Canada to join her, because she was also afraid of him. Finally, in January 2008, Nora Estela too left for Canada, because her father had found her in Tijuana and had allegedly also made death threats against her.

[9] In July 2008, Mr. Flores Gutierrez allegedly tried to attack his son Rodolfo. In August 2008, Rodolfo realized that his father had found them, because he was prowling around the place where he was living with his mother.

[10] On September 1, 2008, Mr. Flores Gutierrez went to their home, armed with a pistol. After Rodolfo called the police, Mr. Flores Gutierrez reiterated that he was going to kill them and left.

[11] On September 2, 2008, Ms. Campos Juanillo and her son went into hiding in a small rented house in the village of Zacapu in Michoacan State. On September 27, 2008, they decided to leave Mexico and they arrived in Canada on the same date.

Decision Under Review

[12] The panel determined that the applicants were not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the Act because they had not met the burden of establishing that there was a serious possibility that they would be persecuted on a ground set out in the Convention or that if they were to return to Mexico they would be personally subjected to a danger of torture or a risk to their lives or a risk of cruel and unusual treatment or punishment.

[13] The panel first noted that the determinative issue in this case is state protection. The panel observed that a refugee protection claimant must seek help from his or her country before seeking international protection, in this case from Canada. Citing *Luna v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1132, [2008] F.C.J. No. 1501, paras. 17 and 18, the panel noted that Mexico is a functioning democracy and there is a strong presumption of state protection, notwithstanding the problems that exist.

[14] The panel also reported that the documentary evidence showed that in spousal and familial violence cases the police are sometimes reluctant to intervene because spousal violence is a private matter.

[15] Based on the testimony relating to the incident that occurred on July 1, 2006, the panel was of the opinion that Ms. Campos Juanillo was unable to show that the actions of the police authorities

were ineffective because she never knew what happened afterward, since she never tried to obtain information by following up on the complaint.

[16] The panel also noted that after the children moved, none of them contacted the police to reactivate the case and inform them that their father had found them and threatened them again.

[17] The panel therefore concluded that it was not sufficient, to rebut the presumption of state protection, to state that the police had been called and had done nothing. In addition, the panel noted that when Mr. Flores Gutierrez went to their door in Toluca and Rodolfo called the police, no official complaint was made.

[18] The panel also stated that the applicants had exhibited a lack of interest in the resources that might have been available to them in their country, such as consultation with a lawyer or an organization that assists victims of family violence.

Relevant Legislation

[19] The following provisions of the Act are relevant in this case:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Issue

[20] The only issue in this application for judicial review is whether the decision by the panel that the applicants are not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the Act because of the availability of state protection is reasonable.

Standard of Review

[21] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 53, the Supreme Court held that when a tribunal examines questions of law and fact that cannot be easily separated, the reviewing court will accord deference to the tribunal. Accordingly, the applicable standard of review in this case is “reasonableness”. At paragraph 47 of that decision, the Supreme Court stated:

. . . reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] In addition, it is settled law that this Court recognizes that the Immigration and Refugee Board, as a specialized administrative tribunal, enjoys expertise in the matters in which it exercises jurisdiction and the Court must accord it deference (*Acosta v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 [2009] F.C.J. No. 270 (QL)).

[23] It is also recognized that the findings made by the Board in respect of state protection are reviewable on the reasonableness standard (see *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584, at para. 38; *Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, [2008] F.C.J. No. 737, at para. 14; *Chagoya v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] F.C.J. No. 908, at para. 3).

Analysis

[24] In respect of state protection, Justice La Forest stated the following in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, confirmed in *Mendivil v. Canada (Secretary of State)*, [1994] F.C.J. No. 2021, at para. 13: “Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.” Unless the state concedes its inability to protect a claimant, “clear and convincing confirmation of a state's inability to protect must be provided”.

[25] In *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399, at para. 38, the Federal Court of Appeal stated, with respect to the burden of proof, standard of proof and quality of the evidence of an allegation of inadequate state protection or lack of state protection of its citizens:

[38] A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[26] The applicants allege that because protection in Mexico is ineffective, it is not necessary to file a complaint with the authorities. However, in light of the facts, the testimony of the parties and the evidence submitted, it is apparent from that evidence that the applicants failed to rebut the presumption of state protection by clear and convincing evidence that the state protection is

inadequate or non-existent in Mexico. Even if that protection is shown not to be perfect, the applicants had an obligation to establish that they had done what was necessary in the circumstances to seek protection from Mexico before seeking protection from Canada.

[27] In *Sosa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 275, [2009] F.C.J. No. 343, at para. 22, Justice de Montigny stated:

[22] Regardless of the deficiencies that may exist in the Mexican criminal justice system, the fact remains that Mexico is a functioning democracy with a state apparatus that provides a measure of protection for its citizens. The fact that protection at the local level cannot be ensured does not exempt the applicant from taking other steps.

[28] In *Luis v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 352, [2009] F.C.J. No. 444, at para. 17, this Court decided that “[t]he applicants’ failure to make any serious or reasonable efforts to avail themselves of their country’s protection does not allow them to rebut this presumption [and] is fatal to their claim . . .”.

[29] The applicants alleged as well that the documentary evidence showed that Mexican women are defenceless against spousal violence because protection is ineffective.

[30] This Court is of the opinion that in developing its analysis, the panel did not disregard the documentary evidence and referred specifically to that evidence, which is that the spousal violence situation is not ideal but certain recourses and services are still available. In its decision, the panel referred to Exhibit A-1: National Documentation Package on Mexico, June 29, 2009, Tab 5.1,

Canada, March 2003, Immigration and Refugee Board (IRB), Mexico: Domestic Violence and Other Issues Related to the Status of Women (panel's decision at paras. 11-12).

[31] In support of his submissions at the hearing before this Court, the respondent referred to *Claudia Jacqueline Garcia Bautista and Minister of Citizenship and Immigration*, 2010 FC 126, a decision of Justice Beaudry.

[32] Although that case concerns a citizen of Mexico who was a victim of spousal violence, the facts of the case may be distinguished from the facts in this case and the parallels drawn by counsel for the applicants are not applicable. More specifically, the applicant in *Bautista* had unsuccessfully sought assistance from the authorities on three occasions.

[33] In the case before us, the applicants were not ignored and the authorities intervened when the complaint was filed. After Mr. Gutierrez tried to strangle Esther, she filed a complaint with the police. She was seen by two people who took down her deposition. The authorities also assigned a physician to look after her physical injuries. Esther also testified that the two people at the police station told her that [TRANSLATION] “they were going to arrest him [Mr. Gutierrez], not to worry, he [Mr. Gutierrez] was going to be arrested” (Tribunal Record at p. 417). The authorities also issued an appearance warrant against Mr. Gutierrez (Tribunal Record at p. 339). It is difficult, in the circumstances, to conclude that the authorities refused to intervene. In terms of follow-up by the female applicants, the evidence is that after filing that complaint, the applicants did not pursue

their efforts and no follow-up was done by them (Tribunal Record at pp. 421, 422, 426, 430 and 433).

[34] In fact, as the panel observed in its decision, the applicants never followed up on their complaint and never alerted the authorities to the fact that there was still an imminent threat to their lives because of the threats made by Mr. Flores Gutierrez. The evidence is that the applicants simply decided to leave the country rather than exhaust the other recourses available to them.

[35] Having applied the documentary evidence to the facts in this case, this Court is of the opinion that the decision of the panel is reasonable.

[36] It is settled law that it is not sufficient for an applicant to show that state protection is not “effective” or is not “perfect” to rebut the presumption of state protection; an applicant in fact has the heavy onus of proving that state protection is “inadequate” (see *Cueto v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 805, [2009] F.C.J. No. 917, at paras. 27-28 ; *Cordova v. Canada (M.C.I)*, 2009 FC 309, [2009] F.C.J. No. 620 (QL)).

[37] In conclusion, the decision of the panel holding that the applicants had not rebutted the presumption of state protection is reasonable and the intervention of this Court is not warranted.

[38] For all these reasons, the application for judicial review is dismissed. The parties did not propose any question for certification and there is none in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

“Richard Boivin”

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

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